

405 KAR 8:050. Permits for special categories of mining.

RELATES TO: KRS 350.093, 350.445, 350.450, 350.465

STATUTORY AUTHORITY: KRS 350.020, 350.028, 350.060, 350.093, 350.151, 350.450, 350.465

NECESSITY, FUNCTION, AND CONFORMITY: KRS Chapter 350 requires the cabinet to promulgate administrative regulations pertaining to permits for surface coal mining and reclamation operations, including certain special categories of mining. This administrative regulation establishes permit application requirements for special mining categories, including mining on prime farmland, augering, in situ processes, off-site coal preparation plants, mountaintop removal mining, and mining on steep slopes. This administrative regulation establishes the only variance from the requirement to return to approximate original contour in steep slopes. This administrative regulation establishes the manner in which the contemporaneous reclamation requirements can be met for combined surface and underground mining activities.

Section 1. In Situ Processing Activities. (1) Applicability. This section applies to any person who conducts or intends to conduct surface coal mining and reclamation operations utilizing in situ processing activities.

(2) Application requirements. Any application for a permit for operations covered by this section shall be made according to all requirements of this chapter applicable to underground mining activities. In addition, the mining and reclamation operations plan for operation involving in situ processing activities shall contain information establishing how those operations will be conducted in compliance with the requirements of 405 KAR 20:080, including:

- (a) Delineation of proposed holes and wells and production zone for approval of the cabinet;
- (b) Specifications of drill holes and casing proposed to be used;
- (c) A plan for treatment, confinement, or disposal of all acid-forming, toxic-forming, or radioactive gases, solids, or liquids constituting a fire, health, safety or environmental hazard caused by the mining and recovery process; and

- (d) Plans for monitoring surface and groundwater and air quality, as required by the cabinet.

(3) Criteria for approval. A permit shall not be issued for operations covered by this section unless the cabinet first finds, in writing, upon the basis of a complete application made in accordance with subsection (2) of this section, that the operation will be conducted in compliance with all requirements of this chapter relating to underground mining activities, and 405 KAR 20:080 and 405 KAR Chapter 18.

Section 2. Augering. (1) General.

(a) This section applies to any person who conducts or intends to conduct surface coal mining and reclamation operations utilizing augering operations.

(b) Any application for a permit for operations covered by this section shall contain, in the mining and reclamation plan, a description of the augering methods to be used and the measures to be used to comply with 405 KAR 20:030.

(c) A permit shall not be issued for any operations covered by this section unless the cabinet finds, in writing, that in addition to meeting all other applicable requirements of this chapter, the operation will be conducted in compliance with 405 KAR 20:030.

(2) Augering on previously mined lands.

(a) In addition to other requirements of 405 KAR Chapter 8, each application for a permit to conduct auger mining on an area mined prior to May 3, 1978, and not reclaimed to the standards of 405 KAR, shall contain such information as the cabinet deems necessary to describe the proposed affected area and method of operation and show that the proposed method of

operation will result in stable postmining conditions, and reduce or eliminate adverse environmental conditions created by previous mining activities.

(b) If the cabinet determines that the affected area cannot be stabilized and reclaimed subsequent to augering or that the operation will result in adverse impact to the proposed permit area or adjacent area, the permit shall not be issued.

(c) The cabinet shall, consistent with all applicable requirements of KRS Chapter 350 and 405 KAR Chapters 7 through 24, issue a permit if the applicant demonstrates that the proposed surface coal mining operations will provide for reduction or elimination of the highwall, or reduction or abatement of adverse impacts resulting from past mining activities, or stabilization or enhancement of the previously mined area.

(d) The cabinet shall ensure that all applicable performance standards can be met.

Section 3. Prime Farmlands. (1) Applicability. This section applies to any person who conducts or intends to conduct surface coal mining and reclamation operations on prime farmlands historically used for cropland. This section does not apply to:

(a) Lands on which surface coal mining and reclamation operations are conducted pursuant to any permit issued prior to August 3, 1977.

(b) Lands on which surface coal mining and reclamation operations are conducted pursuant to any renewal or revision of a permit issued prior to August 3, 1977. For the purposes of this paragraph, "renewal" of a permit shall mean a decision by the cabinet to extend the time by which the permittee may complete mining within the boundaries of the original permit; and "revision" of the permit shall mean a decision by the cabinet to allow changes in the method of mining operations within the original permit area, or the decision of the cabinet to allow incidental boundary changes to the original permit.

(c) Lands included in any existing surface coal mining operation, for which a permit was issued for all or any part thereof prior to August 3, 1977, if:

1.a. The lands are part of a single continuous surface coal mining operation begun under a permit issued before August 3, 1977;

b. The permittee had a legal right to mine the lands prior to August 3, 1977 through ownership, contract, or lease but not including an option to buy, lease, or contract; and

c. The lands contain part of a continuous recoverable coal seam that was being mined in a single continuous mining pit (or multiple pits if the lands are proven to be a part of a single continuous surface coal mining operation) begun under a permit issued prior to August 3, 1977;

2. A single continuous surface coal mining operation is presumed to consist only of a single continuous mining pit under a permit issued prior to August 3, 1977, but may include noncontiguous parcels if the permittee can prove by clear and convincing evidence that, prior to August 3, 1977, the noncontiguous parcels were a part of a single permitted operation. For the purpose of this paragraph, clear and convincing evidence includes, but is not limited to, contracts, leases, deeds, or other properly executed legal documents (not including options) that specifically treat physically separate parcels as one (1) surface coal mining operation; and

3. For the purposes of this paragraph a pit shall be deemed to be a single continuous mining pit even if portions of the pit are crossed by a road, pipeline, railroad or powerline or similar crossing; and

(d) The following facilities associated with an underground mining activity, if the facilities affect a minimal amount of land and if the facilities are actively used over extended periods of time:

1. Coal processing plants;
2. Support facilities; and
3. Roads.

(2) Application requirements. If land within the proposed permit area is identified as prime farmland pursuant to 405 KAR 8:030, Section 21 or 405 KAR 8:040, Section 21, the applicant shall submit a plan for the mining and restoration of the land. Each plan shall contain, at a minimum:

(a) A soil survey of the permit area conducted by the SCS according to the standards of the National Cooperative Soil Survey and in accordance with the procedures established in U.S. Department of Agriculture Handbooks 436 Soil Taxonomy (SCS) and 18 Soil Survey Manual (SCS) as incorporated by reference in 405 KAR 7:015. The SCS establishes the standards of the National Cooperative Soil Survey and maintains a National Soils Handbook that establish procedures for conducting soil surveys.

1. The soil survey shall include a soils map, a description of each soil mapping unit, and profile descriptions of each soil using representative descriptions from the soil survey area as determined by the SCS including soil-horizon depths, textures, pH values, and consistence for each prime farmland soil unit within the permit area.

2. In addition to the representative soil profile description provided by the SCS, the applicant may submit site-specific soil profile descriptions of the permit area prime farmland soil mapping units. These descriptions shall be prepared by persons meeting the qualification requirements of the SCS prime farmland specifications incorporated by reference in 405 KAR 20:040. These descriptions shall comply with NCSS standards and shall include the name, address and qualifications of the soil scientist that prepared them. If the on-site descriptions are not obtained and included in the application, then the representative soil profile descriptions provided by the SCS shall be deemed by the cabinet as representative of the soils in the permit area and the soil-horizon depths and other data therein shall serve as a basis for determining if reclaimed prime farmland areas have been restored to proper depth and meet other reconstruction standards of 405 KAR 20:040, Section 4.

3.a. Bulk density of the prime farmland soils prior to mining shall be documented and included in the application.

b. These densities shall be obtained either by testing samples from each soil mapping unit by ten (10) inch soil layers or by using estimates provided for each soil series by the SCS.

4. The cabinet may require the applicant to provide information on other physical and chemical soil properties as needed to make a determination that the applicant has the technological capability to restore the prime farmland within the permit area to the soil reconstruction standards of 405 KAR 20:040;

(b) A detailed plan for soil removal, storage, and reconstruction that demonstrates that the applicant has the technological capability to comply with 405 KAR 20:040. The plan shall include at a minimum:

1. The proposed methods and types of equipment to be used for soil removal, storage, and reconstruction, including equipment operation patterns, use of ripping and chiseling, stockpile locations, and erosion control measures;

2. A description of measures to be taken to avoid excessive compaction of soils;

3. A description of measures to be taken to ensure that soil removal, handling, and reconstruction operations shall be conducted within soil moisture ranges that will minimize compaction;

4. A description of any soil amendments to be applied;

5. Maps, plans, and cross-sections depicting the location and acreages of reconstructed prime farmland soil mapping units, final grading configuration, drainage, and erosion control measures; and

6. Available agricultural school studies or other scientific data for areas with comparable soils, climate, and management (including water management) that demonstrate that the pro-

posed method of reclamation, including the use of soil mixtures or substitutes according to the requirements of 405 KAR 20:040, if any, will achieve, within a reasonable time, levels of yield equivalent to, or higher than, those of nonmined prime farmland in the surrounding area. The demonstration for soil substitutes or mixtures shall include analyses performed by a qualified soil scientist and analyses of physical and chemical parameters of the original soils and the substitute soil materials or soil mixtures as required by the cabinet (which shall be conducted by a qualified laboratory).

(c) A plan for revegetation, crop production, and demonstration of restoration of soil productivity in conformance with 405 KAR 20:040, Section 5. The cabinet may allow detailed cropping plans, including items such as identification of reference crops, locations of test plots, and yield measurement methodologies, to be submitted after issuance of the permit, as a revision to the permit, provided that the permit is conditioned to require submission of the detailed plan at least one (1) year prior to initiation of crop production on the reclaimed area for the purpose of demonstration of compliance with 405 KAR 20:040. The initial revegetation plans shall be included in the application before the permit is issued. Permits issued prior to February 4, 1986 shall be revised to comply with this paragraph at least one (1) year prior to initiation of crop production on the reclaimed area for the purpose of demonstration of compliance with 405 KAR 20:040.

(3) Cabinet consultation with the SCS.

(a) Before any permit is issued for areas that include prime farmlands, the cabinet shall consult with the state conservationist, SCS.

(b) The state conservationist shall provide for the review of and comment on the proposed method of soil reconstruction in the plan submitted pursuant to subsection (2) of this section. If the state conservationist considers those methods to be inadequate, he or she shall suggest revisions to the cabinet resulting in more complete and adequate reconstruction.

(4) Criteria for approval. A permit for the mining and reclamation of prime farmland may be granted by the cabinet, if it first finds, in writing, upon the basis of a complete application, that:

(a) The approved proposed postmining land use of these prime farmlands will be cropland;

(b) The permit incorporates as specific conditions the contents of the plan submitted pursuant to subsection (2) of this section, after consideration of any revisions to that plan suggested by the state conservationist pursuant to subsection (3) of this section;

(c) The applicant has the technological capability to restore the prime farmland, within a reasonable time, to equivalent or higher levels of yield as nonmined prime farmland in the surrounding area under equivalent levels of management; and

(d) The proposed operations will be conducted in compliance with the requirements of 405 KAR 20:040 and other environmental protection performance and reclamation standards for mining and reclamation of prime farmland of 405 KAR Chapters 7 through 24.

Section 4. Mountaintop Removal Mining. (1) Applicability. This section applies to any person who conducts or intends to conduct surface mining activities by mountaintop removal mining.

(2) Mountaintop removal mining means surface mining activities, where the mining operation removes an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill, except as established in 405 KAR 20:050, Section 1(6), by removing substantially all of the overburden off the bench and creating a level plateau or a gently rolling contour, with no highwalls remaining, and capable of supporting postmining land uses in accordance with the requirements of this section.

(3) Criteria for approval. The cabinet may issue a permit for mountaintop removal mining, without regard to the requirements of 405 KAR 16:190 to restore the lands disturbed by such mining to their approximate original contour, if it first finds, in writing, on the basis of a com-

plete application, that:

(a) The proposed postmining land use of the lands to be affected will be an industrial, commercial, agricultural, residential, or public facility (including recreational facilities) use;

(b) After consultation with the appropriate land-use planning agencies, if any, the proposed land use is deemed by the cabinet to constitute an equal or better economic or public use of the affected land compared with the premining use;

(c) The applicant has presented specific plans for the proposed postmining land use and appropriate assurances that the use shall be:

1. Compatible with adjacent land uses;
2. Obtainable according to data regarding expected need and market;
3. Assured of investment in necessary public facilities;
4. Supported by commitments from public agencies where appropriate;
5. Practicable with respect to private financial capability for completion of the proposed use;
6. Planned pursuant to a schedule attached to the reclamation plan so as to integrate the mining operation and reclamation with the postmining land use; and
7. Designed by a registered engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site;

(d) The proposed use shall be consistent with adjacent land uses and existing state and local land use plans and programs;

(e) The cabinet has provided, in writing, an opportunity of not more than sixty (60) days to review and comment on proposed use to the governing body of general purpose government in whose jurisdiction the land is located and any state or federal agency that the cabinet, determines in accordance with 405 KAR 16:210 to have an interest in the proposed use;

(f) The applicant has demonstrated that, in place of restoration of the land to be affected to the approximate original contour under 405 KAR 16:190, the operation will be conducted in compliance with the requirements of 405 KAR 20:050;

(g) The requirements of 405 KAR 20:050 are made a specific condition of the permit;

(h) All other requirements of KRS Chapter 350 and 405 KAR Chapters 7 through 24 are met by the proposed operations; and

(i) The permit is clearly identified as being for mountaintop removal mining.

(4) Periodic review.

(a) Any permits issued pursuant to this section shall be reviewed by the cabinet to evaluate the progress and development of mining activities to establish that the permittee is proceeding in accordance with the terms of the permit:

1. Within the sixth month preceding the third year from the date of its issuance;
2. Before each permit renewal; and
3. Not later than the middle of each permit term.

(b) Any review required pursuant to paragraph (a) of this subsection need not be held if the permittee has demonstrated and the cabinet finds, in writing, within three (3) months before the scheduled review, that all operations under the permit are proceeding and will continue to be conducted in accordance with the terms of the permit and requirements of KRS Chapter 350 and 405 KAR Chapters 7 through 24.

(5) Modifications of permit. The terms and conditions of a permit for mountaintop removal mining may be modified at any time by the cabinet, if it determines that more stringent measures are necessary to insure that the operation involved is conducted in compliance with the requirements of KRS Chapter 350 and 405 KAR Chapters 7 through 24.

Section 5. Steep Slope Mining. (1) This section applies to any person who conducts or in-

tends to conduct steep slope surface coal mining and reclamation operations, except:

(a) A case in which an applicant proposes to conduct surface coal mining and reclamation operations on flat or gently rolling terrain, leaving a plain or predominantly flat area, but on which an occasional steep slope is encountered as the mining operation proceeds;

(b) A case in which a person obtains a permit pursuant to the provisions of Section 4 of this administrative regulation; or

(c) To the extent that a person obtains a permit incorporating a variance pursuant to Section 6 of this administrative regulation.

(2) Any application for a permit for surface coal mining and reclamation operations covered by this section shall contain sufficient information to establish that the operations will be conducted in accordance with the requirements of 405 KAR 20:060, Section 2.

(3) A permit shall not be issued for any operations covered by this section, unless the cabinet finds, in writing, that in addition to meeting all other requirements of this chapter, the operation will be conducted in accordance with the requirements of 405 KAR 20:060, Section 2.

Section 6. Variances from Approximate Original Contour Restoration Requirements for Nonmountaintop Removal, Steep Slope Mining. (1) Pursuant to 405 KAR 20:060, Section 3, the cabinet may issue a permit for nonmountaintop removal, steep slope mining, which includes a variance from the requirements of 405 KAR 16:190, 18:190, and 20:060, Section 2(3) to restore the disturbed areas to their approximate original contour. The permit may contain a variance only if the cabinet finds, in writing, that the applicant has demonstrated, on the basis of a complete application, that the requirements of 405 KAR 20:060, Section 3 are met.

(2) If a variance is granted pursuant to this section:

(a) A statement shall be listed on the permit making the requirements of 405 KAR 20:060, Section 3 a specific condition; and

(b) The permit shall be specifically marked as containing a variance from approximate original contour.

(3) Periodic review.

(a) Except as established in paragraph (b) of this subsection, each permit incorporating a variance issued pursuant to this section shall be reviewed by the cabinet at least every thirty (30) months following the issuance of the permit to evaluate the progress and development of the mining activities, to establish that the permittee is proceeding in accordance with the terms of the variance.

(b) If the permittee demonstrates to the cabinet that the operations involved have been and continue to be conducted in compliance with the terms and conditions of the permit, and the requirements of KRS Chapter 350 and 405 KAR Chapters 7 through 24, the review required in paragraph (a) of this subsection need not be held.

(4) Modifications of permit. The terms and conditions of a permit incorporating a variance pursuant to this section may be modified at any time by the cabinet, if it determines that more stringent measures are necessary to insure that the operations involved shall be conducted in compliance with the requirements of KRS Chapter 350 and 405 KAR Chapters 7 through 24.

Section 7. Variances for Delay in Contemporaneous Reclamation Requirement in Combined Surface and Underground Mining Operations. (1) Applicability.

(a) This section applies to any permittee or permittees who conduct or intend to conduct combined surface mining activities and underground mining activities in which compliance with the time frames for reclamation as established in 405 KAR 16:020, Section 2, is not practicable and a delay is requested to allow underground mining activities to be conducted before the reclamation operations for the surface mining activities can be completed.

(b) This section provides only for delay in reclamation of surface mining activities, if that delay will allow underground mining activities to be conducted to ensure both maximum practical recovery of coal resources and to avoid multiple future disturbances of surface lands or waters.

(2) Application requirements. Any applicant who desires to obtain a variance pursuant to this section shall file with the cabinet complete applications for both the surface mining activities and underground mining activities that are to be combined. The mining and reclamation operation plans for these permits shall contain appropriate narratives, maps, and plans that:

(a) Show why the proposed underground mining activities are necessary or desirable to assure maximum practical recovery of coal;

(b) Show how multiple future disturbances of surface lands or waters will be avoided;

(c) Identify the specific surface areas for which a variance is sought and the particular sections of KRS Chapter 350 and 405 KAR Chapters 7 through 24 from which a variance is being sought;

(d) Show how the activities will comply with 405 KAR 16:010, Section 3 and other applicable requirements of 405 KAR Chapters 7 through 24;

(e) Show why the variance sought is necessary for the implementation of the proposed underground mining activities;

(f) Provide an assessment of the adverse environmental consequences and damages, if any, that will result if the reclamation of surface mining activities is delayed; and

(g) Show how temporary off-site storage of spoil will be conducted to comply with the requirements of KRS Chapter 350 and 405 KAR 18:190, Section 6.

(3) Criteria for approval. A permit incorporating a variance under this section may be issued by the cabinet if it first finds, in writing, upon the basis of a complete application filed in accordance with this section that:

(a) The applicant has presented, as part of the permit application, specific, feasible plans for the proposed underground mining activities;

(b) The proposed underground mining activities are necessary or desirable to assure maximum practical recovery of the mineral resources and will avoid multiple future disturbances of surface land or waters;

(c) The applicant, pursuant to 405 KAR Chapters 7 through 24, has satisfactorily demonstrated that the applications for the surface mining activities and underground mining activities conform to the requirements of 405 KAR Chapters 7 through 24 and that all other permits necessary for the underground mining activities have been issued by the appropriate authority;

(d) The surface area of surface mining activities proposed for the variance has been shown by the applicant to be necessary for implementing the proposed underground mining activities;

(e) Substantial adverse environmental damage, either on-site or off-site, will not result from the delay in completion of reclamation otherwise required by KRS Chapter 350 and 405 KAR 16:020;

(f) The operations will, insofar as a variance is authorized, be conducted in compliance with the requirements of 405 KAR 16:010, Section 3 and other applicable requirements of KAR Title 405;

(g) Temporary off-site storage of spoil will comply with the requirements of KRS Chapter 350 and 405 KAR 18:190, Section 6;

(h) Liability pursuant to the performance bond required to be filed by the applicant with the cabinet pursuant to 405 KAR Chapter 10 will be for the duration of the underground mining activities and until all requirements of 405 KAR Chapter 10 have been complied with; and

(i) The permit for the surface mining activities contains specific conditions:

1. Specifying the particular surface areas for which a variance is authorized; and

2. Providing a detailed schedule for reclamation in lieu of requirements of the time frames

established in 405 KAR 16:020, Section 2.

(4) Periodic review. A variance granted pursuant to a permit issued in accordance with this section shall be reviewed by the cabinet no later than three (3) years from the dates of issuance of the permit and any permit renewals.

Section 8. Coal Processing Plants Not Located Within the Permit Area of a Specified Mine.

(1) Applicability. This section applies to any person who operates or intends to operate a coal processing plant not within a permit area of a specific mine, other than located at the site of ultimate coal use.

(2) Permit required. Any person who operates or intends to construct or operate such a coal processing plant shall obtain a permit from the cabinet pursuant to 405 KAR Chapters 7 through 24.

(3) Previously exempted operations. This subsection applies only to those coal processing plants subject to 405 KAR 20:070, Section 5.

(a) On or before February 1, 1986, a person operating a coal processing plant who intends to operate after August 1, 1986 shall file an initially complete (as established in 405 KAR 8:010, Section 13(1)(a)) permit application pursuant to 405 KAR Chapters 7 through 24. A person shall not operate a coal processing plant after August 1, 1986 unless that operation is being conducted pursuant to a permit issued pursuant to 405 KAR Chapters 7 through 24, except that a person may continue to operate a coal processing plant after August 1, 1986 without a permit if:

1. An initially complete permit application has been timely filed. "Timely filed" shall mean filed on or before February 1, 1986, or if filed within that time but determined to be initially incomplete, resubmitted within fifteen (15) calendar days of being served notice by the cabinet that the application is initially incomplete. Notice shall be served in accordance with 400 KAR 1:110, Section 5.

2. The cabinet has yet to issue or deny the permit; and

3. The person complies with the performance standards of 405 KAR 20:070.

(b) The applicant shall file a performance bond pursuant to 405 KAR Chapter 10 within sixty (60) calendar days of being served notice of the decision by the cabinet to issue the permit.

1. Notice shall be served in accordance with 400 KAR 1:110, Section 5.

2. If the performance bond is not filed within that time the cabinet shall deny the permit application.

(c)1. Any time limits for cabinet action established in 405 KAR 8:010 shall not apply to permit applications filed pursuant to this subsection.

2. The cabinet shall make every effort to timely review and issue or deny such permit applications prior to August 1, 1986.

(4) Application.

(a) Any application for a permit for operations covered by this section shall be in accordance with 405 KAR 8:030 and, as applicable, 405 KAR 8:050, and shall contain in the mining and reclamation plan, specific plans, including descriptions, maps and drawings of the construction, operation, maintenance, reclamation, and removal of the coal processing plants. The plan shall demonstrate that those operations will be conducted in compliance with 405 KAR 20:070.

(b) For permit applications for operations subject to subsection (3) of this section, the requirements of 405 KAR 8:030, Section 21, and 405 KAR 8:050, Section 3, shall not apply to lands disturbed by the coal processing plants prior to December 1, 1985.

(c) Permit applications for operations subject to subsection (3) of this section, which were timely filed in accordance with subsection (3)(a)1 of this section, need not contain the information required under 405 KAR 8:030, Sections 12, 13, 14(3), and 15(4). An applicant failing

to make a timely filing shall be required to submit this information.

(5) Criteria for approval. A permit shall not be issued for any operation covered by this section unless the cabinet finds, in writing, that, in addition to meeting all other applicable requirements of this chapter, the operations will be conducted in compliance with the requirements of 405 KAR 20:070.

Section 9. Underground Only Permits. (1) Applicability. This section applies to any person who conducts or intends to conduct an underground only operation, which does not have a surface disturbance.

(2) Application requirements. Any application for a permit for operations covered by this section shall be made according to all requirements of 405 KAR Chapter 8 applicable to underground mining activities.

(3) Criteria for approval. A permit shall not be issued for an operation covered by this section unless the cabinet first finds, in writing, upon the basis of a complete application made in accordance with subsection (2) of this section that the operation will be conducted in compliance with all requirements of this chapter relating to underground mining activities, and 405 KAR 20:090 and 405 KAR 18:060, 18:070, 18:110, and 18:210.

(4) Bonding. A permit with an underground only area in the commonwealth shall comply with the bonding requirements of 405 KAR Chapter 10. (8 Ky.R. 1511; eff. 1-6-1983; Am. 12 Ky.R. 924; 1310; eff. 2-4-1986; 15 Ky.R. 432; eff. 12-13-1988, 44 Ky.R. 620, 1303; eff. 1-5-2018.)